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ABSTRACT

Court decisions concerning the residential placement of disabled children have tended to assign the primary responsibility to school districts when a child's education is affected by the placement. Because the costs of full-time residential placement are very high, school districts should analyze requests for such placement quickly and should be inventive in suggesting programs that will utilize the resources of other social agencies in addition to those of the school. Rejection of requests for placement may lead to litigation that could result in the district having to shoulder the whole burden, even for those aspects of the placement not specifically linked to educational needs. This report reviews several legal issues associated with the assignment of responsibility for various degrees of residential care, citing 30 relevant court cases. (PGD)

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RESIDENTIAL PLACEMENTS OF HANDICAPPED STUDENTS

Cutbacks in funding to social service agencies, the breakdown of traditional family structures and pressure from advocates have led to an increase in requests for LEA's to provide or fund residential placements. In the leading case of Kruelle v. New Castle, 642 F.2d 687 (3d Cir. 1981), the Court of Appeals verified that under EHA and LEA may be required to fund a residential placement as a related service required to assist a handicapped youngster to benefit from special education. Confronted with a student who needs placement in a setting away from the home, the LEA must focus analysis on whether full time placement is necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process. Evaluations also must attempt to distinguish between a residential placement that is a necessary predicate for learning and the provision of services that are unrelated to learning skills. The Kruelle Court found that it could not segregate the medical and educational grounds for certain services and held that in such a situation the burden is on the education system to provide the residential placement.

Numerous cases decided since Kruelle have grappled with the problem of segregating students needs and determining whether an LEA's offer of less than full time residential placement but more than regular day school was appropriate to meet educational needs. A lesson for LEA's gleaned from the decisions is that

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they should be prompt, inventive and flexible in performing evaluations and in offering additional program components if they are to avoid the costs of residential programs which are not justified by educational requirements.

With annual charges for residential placements commonly exceeding $75,000.00, the risk of substantial fiscal liability justifies LEA's in taking steps, even costly ones, to prepare cases for litigation. It is rarely effective to delay preparation while pressuring a health or welfare agency to provide services, since their legal mandate may allow them to decline to act for fiscal reasons. If failure to offer a program leads to litigation, a court probably will not answer the questions of which agency must pay, but will find all parties generally liable and education primarily responsible. See, Parks v. Pavkovic, 753 F.2d 1397 (7th Cir. 1985). Further, if the parents place the youngster residentially at their expense and this placement is later found appropriate, the LEA will be liable for reimbursement. Burlington School Committee v. Massachusetts, _____U.S._____ (1985). Since the residential institution likely will be a source of evidence on need and appropriateness, a fact-finder's recommendation in favor of such a placement is increased. See, Tolland v. Connecticut, _____ F.Supp. _____ (D.Conn. 1985)(institution's testimony that academic curreiculum must be integrated with a social learning curriculum, and the total program including social exposure in a therapeutic small group setting must be highly structured, consistent and continuous).

One common difficulty with potential residential referrals is that by definition the youngster should have substantial problems and thus there is a likelihood that he is not in a public system with current evaluations from LEA staff. Unless evaluation are done promptly, the LEA will be dependent on information and opinions from outsiders, and have little factual basis to dispute their conclusions. Case No. SE-68-83, 1984-85 EHLR DEC. 506:195; Case No. SE-48-84, 1985-86 EHLR DEC. 507:115; Case No. SE-22-85, EHLR DEC. 507:279. Whenever possible the LEA should have professionals whose judgment it trusts observe and evaluate the student. With their findings an LEA will be able to argue that specially trained educators are better qualified to make recommendations concerning educational programs and placements than are the students' physicians. However, for LEA staff's opinions to be considered more credible than the student's witnesses, they must not be based on single sessions conducted in the examiners office. Christopher T. v. San Francisco, 553 F.Supp. 1107 (N.D.Cal. 1982); McKenzie v. Smith, 771 F.2d 1527 (D.C.Cir. 1985). Without its own "educational" evidence, an LEA is limited to trying to discredit the testimony from the students' doctors, perhaps arguing that the needs are so great that they are solely medical and beyond educational. In re: Timothy G., 1984-85 EHLR DEC. 506:118.

With prompt and thorough evaluations, an LEA may be able to segregate a student's emotional, Ahern v. State Board of Education, 593 F.Supp. 962 (D.Del. 1984); medical, Los Gatos v. Doe, _____ F.Supp. _____ (N.D.Cal. 1984);

McKenzie v. Jefferson, 577 F.Supp. 404 (D.DC 1983); and social Abrahamson v. Hershman, 701 F.2d 223 (1st Cir. 1983) needs. One advantage to doing evaluations on the residential issue as soon as possible is that behavior and program implications may be described differently with relevance to educational obligations. There may be no more than a semantic difference between a youngster who "needs to learn to control his behavior problems" as opposed to "needs a facility to control his behavior," but the difference impacts on whether responsibility belongs to an education or social agency. In re: M.F., 1982-83 EHLR DEC. 504:323; William B. v. Ector County, 1984-85 EHLR DEC. 506:231. A youngster who is said to need to "reduce physical aggressiveness" could be interpreted as having a pervasive psychiatric problem or be amenable to a behavior modification program in the classroom. Similarly, a conclusion that a youngster has run away from home has different implications than running away from school. In re: Karen C., 1985-86 EHLR DEC. 507:226; Case No. 63-83, 1983-84 EHLR DEC. 505:230; In re: Wellesley Public Schools, 1982-83 EHLR DEC. 504:268. However, in those states which require that programs must be more than appropriate and assure maximum development, it may be almost impossible to prove that a constant educational program would not be more effective in providing consistent behavior and training controls in all environments. Compare David D. v. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985) and Geis v. Parsippany-Troy Hills, 774 F.2d 575 (3rd Cir. 1985) with In Re: Thoms M., 1984-85 EHLR DEC. 506:346, and Matthews v. Davis, 742 F.2d 825 (4th Cir. 1984).

In addition to differentiating other causes of the need for a residential program, LEA's must show that the less than full time program they are offering is educationally appropriate. The offer must be more than theoretical and one the LEA will put into effect as part of its continuum of service options. In re: Burton School District, 1982-83 EHLR DEC. 504:133. In those cases where a high authority has found the LEA program sufficient, it is because the local district had arranged a package of service delivery which provided much more than a traditional public school day program. Examples of these "extra" components include substantially extending the length of the school day, In re: Dracut Public Schools, 1982-83 EHLR DEC. 504:171, assignment to small alternative sites with substantial therapy components, In re: James M., 1984-85 EHLR DEC. 506:155 and support services provided in the home, In re: Atlanta Public School System, 1982-83 EHLR DEC. 504:199, including home intervention by a specialist in autism, Grand Prairie v. Douglas C., 1984-85 EHLR DEC. 506:240, and respite care after school and one weekends. In re: Gary L., 1985-86 EHLR DEC. 507:105, 220.

Since LEA's traditionally do not provide these extras, it is often more efficient to develop cooperative arrangements with other service providers that do specialize in these areas. In Philadelphia an agreement between the City, County and LEA Provides for a specialized evaluation team to consider all program facets of youngsters referred for placement out of the home. The team then assesses the respective responsibilities of social and educational agencies and the resources available from each to identify a full range of services without overlap or

duplication. Using such devices as Teaching Families (specially trained foster care placements) in conjunction with private day school placements and community mental health facilities, it is often possible to create a program which provides all the essential elements of a residential placement. Case No. SE-12-85, 1985-86 EHLR DEC. 507:177. If the parent would otherwise have a payment liability which would negate the provision of a FAPE, Jenkins v. Florida, _____ F.Supp. _____ (M.D.Fla. 1985) the LEA may arrange to pay the mental health agency directly or negotiate a waiver. If the private day school has doubts about its ability to control behaviors, the LEA may assign one of its classroom aides to the private facility or arrange to pay for an additional aide. Transportation may need to be by cab with an attendant instead of by bus.

Although there are significant expenses and administrative headaches in setting up such programs, the cost is far less than an out-of-State residential placement. In addition, interagency cooperation and sharing of information can lead to more cost-efficient service delivery and may reveal instances of dual billing by private service providers.

In summary, when an LEA is presented with a request for a residential placement, staff should be prepared to spend money in order to save money. It probably will be necessary to obtain evaluations by qualified professionals and to arrange for provision of services from outside agencies in order to be able to offer a parent an appropriate program. Since prompt action is of great value, it is important to plan in advance and develop a procedure for what steps to take when a request is made.